IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:26.02.2002

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

W.P.NO.1582 of 1998 AND W.M.P.NO.2272 of 1998

National Oxigen Limited
rep. by its Company Secrtary
K.V.Devanathan, Alsa Mall
149 Montieth Road, Egmore,
Chennai.8. .. Petitioner

Vs.

1. The Commissioner of Customs,
Customs House, Chennai-01.

2. Customs, Excise and Gold (Control)
Appellate Tribunal, Southern Zonal
Bench rep. by its Registrar,
Shastri Bhavan, Chennai 6. .. Respondents

Petition under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus as stated therein.

For Petitioner: Mr.Mohan Parasaran

For Respondents: Mr.K.Kannan, SPl. Central Govt.Standing Counsel.

: O R D E R

Petitioner company has filed this writ petition praying to issue a writ of certiorarified mandamus calling for the records comprised in proceedings of the second respondent dated 20.1.1998 in Appeal Nos.9 02-903/1997 (Order Nos.112 to 114 of 1999 and quash the same in so far as it relates to payment of Rs.37,50,000/- as condition precedent for the first respondent to adjudicate the matter on remand by the second respondent and consequently direct the first respondent to adjudicate the matter on remand without insisting upon the payment of differential duty and decide all the issues which have been left open uninfluenced by any of the observations made in the impugned order of second respondent or in the order of the first respondent which was appealed against and now remanded back.

2. In the affidavit filed in support of the writ

petition, the petitioner would submit that it is a manufacturer of industrial gases such as Liquid and Gaseous Oxygen Nitrogen etc., that the petitioner has its factory at Pondicherry; that the petitioner came across an advertisement in `Business India' in the year 1989 regarding the sale of a second-hand 75 TPD plant available for sale in California U.S.A. with M/s Nickolai Joffee Corporation (hereinafter called as NJC); that primarily the NJC was a scarp Dealer and had purchased the said plant and machinery as a scrap; that NJC made enquiry in order for sale of the second-hand incomplete plant for a sum of U.S.Dollars 939,500/-; that during December 1991 NJC revised its earl ier offer and quoted a price of US Dollars 7,89,000/-; that in January 1992 NJC informed the petitioner that the price of the plant included U.S.Dollars 1,60,000 /- for reforming and converting 3000 HP and 500 HP Motors from 60 Hzs. to 50 Hzs.; that the NJC further revised the offer on 2nd June 1992 to US Dollars 3,35,000/- FAS plus freight, insurance with the condition that the cost of conversion of two electric motors 3000 HP and 5 00 HP into 50 Hzs. was to be borne by the petitioner; that however, further negotiations were carried out and the petitioner was able to strike a reasonable bargain for import of the incomplete plant at U.S.Dollars 4,31,800/- C&F Chennai, India.

3. The petitioner would further submit that the prescribed format from the Chartered Engineer as per the Statutory requirement was obtained on 6.11.1993; that according to the Certificate, different parts were manufactured by different manufacturers in U.S.A. and the estimated CIF value of equivalent new machinery in the International Market as on date was mentioned as US Dollars 3 Millions; that as an incomplete plant had been initially manufactured in its original shape in the year 1965, the plant was refurbished in 1985 as per the Certificate of Chartered Engineer; that as there were certain restrictions with regard to import of second-hand machinery, it was at the petitioner's suggestion that the year of manufacture or refurbishing could be shown as 1987 as it was declared surplus in that year, the age restriction regarding import of second-hand machinery had been modified and consequently there was no necessity to show the year of manufacture as 1987; that originally the price mentioned was US Dollars 3,17,900/- CIF which was amended to enhance the CIF value to US Dollars 4,33,9 00/- as per the request made by the petitioner to the Director General of Foreign Trade, New Delhi; that on arrival of the shipments, the bills of entry were duly filed in the Chennai Customs House; that since the import was totally an incomplete machinery, the petitioner had imported other items including 24 Nos. large storage tanks and 58 Nos. special cryogenic storage cylinders for storage of liquid Oxygen Nitrogen and Argon manufactured from the second-hand plant valued at US Dollars 9,48,867/- (equivalent to Rs.2,99,48,474/-) on which customs duty of Rs.1,13,43,100/- was additionally paid which formed part of the imported plant; that when the said plant was sought to be cleared, the customs authorities had asked for original invoice of the plant purchased relatable to the year 1965 from the original owner for assessment and clearance of the goods; that the original invoice was not available with them as they were only scrap dealers.

4. The petitioner would further submit that thereafter, the Customs Department pointed out that in terms of the Chartered Engineers Certificate in the prescribed format and as per handbook of procedures, the cost of the new plant was US 3 million Dollars and as against this, the petitioner had purchased the goods for US Dollars 4,31,800/-; that in the light of this the Customs Authorities wanted to make assessment adopting the value arrived at by allowing 70% depreciation by taking the value of the machineries at US Dollars 3 Millions; that as there were some problems in determining the value of the Plant at the time of original sale or at the time of its manufacture, clearing agents of the petitioner had suggested that the same Chartered Engineer could be requested to certify the approximate price of the Plant in the year 1965 at the time of original purchase by the original owner; that taking into consideration the rate of inflation in USA during the period 1965 to 1993, the price was indicated as US Dollars 1,150,0 00/- as the scrap dealer was not in a position to obtain the original invoice; that accordingly the foreign supplier furnished a fresh certificate bearing the same date from the Chartered Engineer mentioning clearly that the original purchase price was not known and the approximate value of new plant during 1965 at the time of original purchase would be US Dollars 1,150,000/-;that in the light of the above said claims and documents, the customs authorities made the assessment and the goods were cleared on payment of duty by granting the benefits of notification No.90 and 91/94 Cus.; that however, after the said assessment, the Zonal Unit of Directorate of Revenue Intelligence visited the premises of the petitioner and scrutinised all the documents and also recorded the statements of the petitioner, and came to the conclusion that all the related invoices were only manipulated ones, and issued show cause notice on 17.10.1996 calling upon the petitioner to show cause as towhy the value of the goods should not be refixed at LRs.3,47,37,377/- and differential duty amounting to Rs73,23,578/- should not be demanded; that the petitioner objected to the various errors in the proposals contained in the show cause notice; that however, the first respondent, the Adjudicating Authority proceeded to misconstrue the original certificate of the Chartered Engineer and the column in particular estimated CIF value of equivalent new machinery in the International market as measuring that the new plant would have cost US Dollars 3,000,000/- in the International Market even in the year 1965 and depreciation has been worked out on that irregular and erroneous basis, and passed an order of adjudication confirming the proposals as contained in the above show cause notice. On such averments, the petitioner praying to allow this writ petition.

5. In the counter affidavit, filed by the respondents it is stated that the petitioner had imported two second hand air separation plants dated 24.5.1994 and 23.6.1994 respectively through the Port of Chennai; that the importers had sought the assessment of the consignment under notifications; that the importer requested for clearance of the air separation plants under project Import Regulations, 1986; that based on the Chartered Engineers Certificate furnished by the importer at the time of import of the cargo, the Bill of Entry were assessed to duty

provisionally under Section 18 of the Customs Act, 1962 and were cleared out of customs; that DRI, Chennai received an intelligence report that the importers imported the second hand plant for liquid oxygen and nitrogen and argon under project import and the goods were misdeclared with regard to value and the clearance of the same was made on the strength of Chartered Engineers Certificate;that scrutiny of the records revealed that the importers had solicited documents and Chartered Engineers Certificate to suit the Export Import Policy and the requirements of the customs and also under-valuation with an intention to evade customs duty; that elaborate enquiries were conducted and subsequently based on the same, a show cause notice was issued to the petitioner on 31.10.1996; that the Commissioner of Customs, Chennai after hearing the petitioner passed an adjudication order confirming the duty based on the enhanced value of the consignment; that he also ordered for the confiscation of the goods under Section 111(m) of the Customs Act, 1962,but allowed to be redeemed on payment of fine of Rs.10 lakhs; that he also imposed penalty of Rs.5 lakhs on appellant company under Section 112 of the Customs Act 1962. On such averments, praying for dismissal of the writ petition.

6. During arguments, the learned counsel appearing on behalf of the petitioner company pointing out paragraphs 10 to 12 of the order of the Appellate Tribunal while dealing with the Chartered Engineers Certificate for import of secondhand plant and machinery that it came to be seen that in the Chartered Engineer's certificate he has shown the value of the plant in the International Market as 3 Million US Dollars and the adjudicating authority relying on the certificate consultant of the petitioner stated that the said certificate pertains to the value of such goods in the year of import particularly clause 4 of the certificate wherein estimated "querry CIF value of equipment new machinery in the International Market" has been answered stating similar capacity of new plants will costs more than 3 Million US Dollars in the International Market. The learned counsel would point out from paragraph 12 of the order of the Appellate Tribunal regarding the aforementioned point 'however, we find that this plea raised by the appellant was not looked into by the adjudicating authority. He has not dealt with this plea of this appellant in the impugned order. The matter is quite arguable of both sides. But a finding should have been entered by the adjudicating authority in this regard which he has not done.' The learned counsel would point out that the Appellate Tribunal would ultimately remand the case but however, requiring the petitioner to deposit 50% of the difference due demanded in this case i. e. a sum of Rs.37,50,000/- requiring the same to be deposited on or before 30.3.1998 and report compliance before the adjudicating authority or on before 31.3.1998 in the event the impugned order would stand set aside and the adjudicating authority should de nova adjudicate the same after granting a personal hearing to the appellant. In full consideration of the certificate of the Chartered Engineer which is filed in the paper book from pages 37to 43 issuing further such and other directions as seen in paragraph 18ofthe order impugned. Though the learned counsel has not aggrieved of the order of remand as made by the appellate Tribunal, the amount of deposit

that is required to be made i.e. 50% of the differential duty demanded to the tune of Rs.37,5 0,000/- as cased concerned and objected to by the petitioner and would pray to quash the said order so far as it relates to the said payment as a condition precedent for the first respondent to adjudicate the matter of remand.

7. The learned Special Central Government Standing Counsel appearing on behalf of the respondents besides confirming the reasons assigned in the counter affidavit in confirmation of the same would cite from the decided cases such as :

i) 1994(071) ELT 646- Mad .(COLLECTOR OF CUSTOMS, MADRAS v. MADRAS ELECTRO CASTINGS P.LTD.)
ii) 1991(052) ELT 0346 -Mad.(S.CHAMPLAL v. UNION OF INDIA)
iii) AIR 1973 KERALA 7 (COLLECTOR OF CUSTOMS ANDCENTRAL EXCISE, COCHIN v. MARKOSE ARNAEUTAKIS, S.T.SPEEDWAY, COCHIN)

8. So far as the first judgment cited above reported in 1994(071) ELT Madras 646 is concerned the first Bench of this Court in its judgment dated 13.10.1993 dealing with the similar situation has ordered that " the Tribunal has got powers to pass appropriate interim orders."

9. In the second judgment cited above reported in 1991 (052) ELT Madras 346, a single Judge of this High Court has held that "a specific remedy has been provided under the Act that procedure should be moved by any aggrieved party. He cannot allow statutory remedy to be barred by time and approach this Court under Article 226 of the Constitution of India for a remedy."

10. In the third judgment cited above reported in AIR 1973 Kerala 7 wherein it has been held that "sufficiency or adequacy of materials for customs authorities to reach to a conclusion regarding commission of an offence under Customs Act cannot be considered in a writ petition."

On such arguments, the learned Special Central Government Standing Counsel would pray to dismiss the above writ petition with costs.

11. In consideration of the pleadings by parties, having regard to the materials placed on record and upon hearing the learned counsel for both what comes to be known is that the petitioner had imported two second hand air separation plants on 24.9.1994 and 23.6.1995 respectively to the Port of Chennai, the petitioner requires for the clearance of the air separation plants under Import Regulations 1986 and based on the Chartered Engineers certificate furnished by the petitioner the Bill of Entry had been assessed duty provisionally under Section 18 of the customs Act 1962 and were cleared out of customs. But on intelligence report received that the goods were mis-declared, on scrutiny of the records it came to be known that the goods were under valued with intent to evade customs duty and on elaborate enquiry held

issuing a show cause notice dated 31.10.1996 the Commissioner of Customs Chennai the first respondent herein passed an adjudication order enhancing the aggregate value of the consignment to Rs.3,47,37,377/- and accordingly confirmed the differential duty of Rs.73,23,578/-, further confiscating the goods under Section 111(m) of the Customs Act 1962, but

permitted to be redeemed on payment of a fine of Rs.10 lakhs further imposing a penalty of Rs.5 lakhs on the petitioner under Section 112 of the Customs Act 1962.

12. Aggrieved, the petitioner had preferred an appeal before the Customs Excise and Gold (Control) Appellate Tribunal (South Zonal Bench) at Madras. In its appeal No.C/V-902, 903/97, the Appellate Tribunal by its order dated 20.1.1998 allowed the appeal and remanded the subject for de nova adjudication by the adjudicating authority subject to the appellant depositing 50% of the differential duty demanded to the tune of Rs.l37,50,000/- with certain other directions. It is this order of the Appellate Tribunal which is under challenge in the above writ petition.

13. As decided in the aforementioned judgments it is not only clear that the appellate Tribunal could make such interim orders,but also by the judgment of the Kerala High Court cited above, it has been made very clear that in matters arising out of Customs Act regarding the sufficiency or adequacy of materials for Customs Authority to reach to a conclusion cannot be considered in a writ petition under Article 226 of the Constitution of India since it is just and proper only for those forums designated by law to deal with such materials and questions connected to various facts and circumstances in order to arrive at a valid and binding decision and therefore whether it is in the remand resorted to by the Appellate Tribunal below ordering a trial de nova or in requiring deposit of the amounts required to be made before the adjudicating authority, (in the case in hand at 50% of the differential duty demanded) and only when such requirement is complied with, the order passed by the adjudicating authority would become set aside.

14. Since on the part of the petitioner absolutely no valid or tangible reason has been assigned as to how such an order passed by the Appellate Tribunal below is bad in law nor any legality either argued or cited as questioning the authority of the Tribunal to pass such an order while making the remand and therefore, it is a case wherein no irregularity or inconsistency or procedural flaw or patent error or perversity in approach or lack of opportunity in violation of the principles of natural justice or even the fairness of the order passed by the Tribunal below is either under challenge or any of these aspects have crept into the order of the Tribunal below and therefore, this Court is unable to see any reason to cause interference in to the order passed by the Tribunal below either in the conclusions arrived at on facts and circumstances encircling the whole case or in the manner the said conclusions have been arrived at and therefore, the interference sought

to be made into the well considered and merited order passed by the Tribunal below in the impugned proceedings is not only undesirable in the circumstances of the case but unwarranted as well.

15. In short, the whole order has been passed in favour of the petitioner by the second respondent Tribunal not only pointing out certain inconsistencies in the order of the authority since vital aspects have not been considered to the expectations of law, but also set aside the very order passed by the considering authority further directing to conduct a denovo enquiry with such opportunities for the petitioner to be heard, but requiring the order to be operative on payment of 50% of the confirmed differential duty to the tune of Rs.73,23,578 /= which in the considered view of the Tribunal was just and necessary and incumbent on overall consideration of the whole case. The petitioner with ill-motivated designs of stalling the enquiry de-novo and to find an escape route from effecting the payment of the said amount ordered to be deposited (in which he has also succeeded from 1998 till this day without effecting the payment of even a single pie) has resorted to file the above writ petition, which, according to the judgment cited above, cannot be done to in such matters in the normal circumstances, no mention need be necessary that the petitioner is permitted to enjoy an order of stay of the orders of the Tribunal without even an application filed on the part of the respondents to vacate the same, ultimately resulting in stalling not only the enquiry proceeding but also the payment of 50% of the differential duty demanded. Therefore, this petition deserves to be dismissed with exemplary costs.

In result,

i)The above writ petition is without merit and the same is dismissed as such with an exemplary cost of Rs.10,000/= (Rupees Ten Thousand Only).

ii)The impugned order dated 20.1.1998 made in Appeal Nos.C/V.902-903/97 (OrderNo.112 to 114/98) by the second respondent Tribunal is hereby confirmed.

iii)Consequently, W.M.P.No.2272 of 1998 is also dismissed.

26.02.2002.
Index:Yes/no
Index for Internet: Yes/No
gr/Rao
V.KANAGARAJ,J

To
1. The Commissioner of Customs, Customs House, Chennai-01.

2. The Registrar,Customs, Excise and Gold (Control)
Appellate Tribunal, Southern Zonal, Shastri Bhavan, Chennai 6.

W.P.NO.1582 OF 1998
26.02.2002.